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No. _____

In The

Supreme Court of the United States

October Term, 1990

MIKE BRITT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The Eighth Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Should the Supreme Court grant certiorari to review a finding that the Sixth Amendment right to counsel is not violated when the government, through an informant, elicits and surreptitiously records statements by a defendant that he, the defendant, committed perjury and obstructed justice in connection with a conspiracy offense for which the defendant is under indictment, and then uses those statements in a hearing on the government's motion to set aside the Defendant's guilty plea to that conspiracy offense, because this finding is inapposite to the holding of the Court in *Maine v. Moulton*?

II.

Should the Supreme Court grant certiorari to review a holding that a plea agreement, drafted by the government after *Ricketts v. Adamson* was decided, authorizes the trial court to set aside the Defendant's guilty plea to a felony drug conspiracy charge, and the government thereafter to file a more serious charge, under the following circumstances – the plea agreement contains no provision that the Defendant, in the event of a breach of his obligations under the plea agreement, waives his right to be twice placed in jeopardy or that a more serious charge will be substituted, but instead, by way of remedy for a breach by the Defendant, provides that the plea agreement is null and void and the government is relieved of its obligations under the agreement and may use Defendant's statements to file new charges – because such an

QUESTIONS PRESENTED FOR REVIEW – Continued

agreement is not precisely equivalent to a waiver of double jeopardy rights?

III.

Should the Supreme Court grant certiorari to review a holding that a defendant waives his Sixth Amendment right not to be twice placed in jeopardy by materially breaching the terms of his plea agreement because constitutional rights are not subject to ad hoc approval by individual district court judges, and to resolve conflicts in principle among the lower courts?

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this matter on the 10th day of October, 1990.

OPINION BELOW

Petitioner seeks review of an opinion and order in a criminal case from the Eighth Circuit Court of Appeals; this opinion affirmed an order from the district court for the Northern District of Iowa that set aside the defendant's guilty plea to a drug conspiracy offense and allowed the government to refile a more serious charge based on the same conduct underlying the guilty plea. The district court ruling was issued by the Hon. Edward McManus, in case number 88-0075, and filed on August 7, 1989. The opinion of the Court of Appeals, case number 89-2719 is reported as *United States v. Britt*, 917 F.2d 353 (8th Cir. 1990). The decisions of the Court of Appeals and the district court are set out in the Appendix.

JURISDICTIONAL STATEMENT

The district court, pursuant to 18 U.S.C. Section 3231, had jurisdiction over the case because the government filed two informations, the second after Britt's first guilty plea was set aside over his objection, each of which charged Britt with violations of federal law. The court of appeal's jurisdiction was invoked pursuant to 18 U.S.C. Section 3742(a) and Rule 4(b), Federal Rules of Appellate Procedure. The Supreme Court's jurisdiction is invoked

on the authority of 28 U.S.C. Section 1254(1) and Rule 20 of the Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the 5th and 6th Amendments to the United States Constitution, which are set out in full in the Appendix at page 62.

STATEMENT OF THE CASE

This is a criminal case which originated in the federal district court for the northern district of Iowa. Britt and Stevens were charged by separate informations with conspiring to possess and deliver marijuana. After Britt entered a guilty plea to that offense, which was unconditionally accepted by the trial court, he testified against Stevens at Stevens' trial.[1] Stevens was convicted, but then, hoping to gain sentencing concessions, he told the government that Britt had not testified to the full scope and extent of the conspiracy. At the government's direction, Stevens went to Britt's home and engaged him in a surreptitiously recorded conversation during which Britt said that he had committed perjury at Stevens' trial and obstructed the investigation into full scope of the conspiracy. The information Stevens obtained was later

[1] This guilty plea is reproduced in the Appendix, pages 39-49.

introduced at a hearing on the Government's motion to set aside Britt's guilty plea to the conspiracy charge.[2]

The government's motion was granted, over defendant's assertion of his right not to be twice placed in jeopardy, and Britt's plea to the original charge was set aside.[3] The government substituted a more serious marijuana conspiracy charge, one that carries a twenty year maximum sentence, and Britt was also indicted for obstruction of justice and perjury. A new plea agreement was reached whereby Britt conditionally pled guilty to the new, more serious conspiracy charge, the condition being that he reserved his right to appeal the order setting aside his original plea to the less serious charge. Britt was sentenced on the second plea to serve a sentence of 184 months in prison, without parole.[4]

The Eighth Circuit Court of Appeals denied Britt's appeal in a case that has or will be reported as *United States v. Britt*, 917 F.2d 353 (8th Cir. 1990).[5]

The details regarding the course of proceedings in this case are as follows:

Britt was arrested on December 12, 1987 by federal agents while attempting to sell marijuana to a Joe Newland. A formal, written plea agreement, dated January 6,

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[2] Relevant portions of the hearing are reproduced in the Appendix, pages 50-53.

[3] The district court's ruling is reproduced in the Appendix, pages 19-28.

[4] The order imposing judgment and sentence is reproduced in the Appendix, pages 54-59.

[5] The decision is reproduced in the Appendix, pages 1-18.

1988, was signed by Britt, his attorneys, and attorneys for the government.[6] This agreement, which sets out the respective duties and obligations of the parties, required that Britt place himself in legal jeopardy by pleading guilty, forfeit assets, help in the investigation of other criminal activity, and to provide complete and truthful information to the government about his prior criminal activities. The agreement provided that in the event of a breach of the agreement by the defendant, that the agreement was "null and void," that the government would be relieved of its obligations under the plea, and statements Britt made to the government could be used to file additional charges.

On October 20, 1988, a one-count information was filed charging Britt with conspiring to distribute and possess marijuana between about 1983 and December 12, 1987, a crime that carried a maximum sentence of five years in prison. Britt entered a guilty plea to that charge on November 8, 1988. Britt's guilty plea was accepted by the Court at that hearing. Sentencing was scheduled for February 7, 1989.

However, prior to the sentencing hearing, the government moved to set aside the guilty plea, and hearings were held on this motion, the last hearing taking place on June 19, 1989. The trial court's order granting the government's motion was filed on August 7, 1989. Britt's second

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[6] This plea agreement is set out in the Appendix, pages 29-38.

guilty plea was entered on August 23, 1989, and he was sentenced on October 16, 1989.[7]

The Eighth Circuit's ruling denying Britt's appeal was filed on October 10, 1990.

Rulings Below

Britt objected to the government's use of the evidence obtained by or derived from Stevens' conversation with Britt and the recording of that conversation. The trial court, first, and thereafter the Eighth Circuit Court of Appeals, found that Britt's Sixth Amendment right to counsel as not violated by the introduction of Britt's recorded statements nor Stevens' testimony about that conversation. The Court of Appeals held that, "while the tape-recorded statements could not be introduced at a proceeding designed to prove that Britt had conspired to distribute marijuana, they were properly introduced at a proceeding designed to demonstrate that Britt had breached his plea agreement and perjured himself." *United States v. Britt*, 917 F.2d 353, 361.

The trial court judge, after considering the government's evidence on the motion to set aside Britt's plea, ruled that he had the authority to set aside Britt's guilty plea because Britt had breached the plea agreement. The Eighth Circuit Court of Appeals agreed, and also found that Britt had waived his Fifth Amendment right not to be twice placed in jeopardy by the terms of the plea agreement.

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[7] The Clerk's Record from the district court is reproduced in the Appendix, pages 60-64.

REASONS FOR GRANTING THE WRIT

I.

The Supreme Court should grant certiorari to review a finding that the Sixth Amendment right to counsel is not violated when the government, through an informant, elicits and surreptitiously records statements by a defendant that he, the defendant, committed perjury and obstructed justice in connection with a conspiracy offense for which the defendant is under indictment, and then uses those statements in a hearing on the government's motion to set aside the Defendant's guilty plea to that conspiracy offense, because this finding is inapposite to the holding of the Court in *Maine v. Moulton*.

Britt relied on *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), to argue that his Sixth Amendment right to counsel was violated when Stevens, acting as an agent of the government, engaged him, after Britt had been charged and pled guilty to the conspiracy charge, in the absence of Britt's counsel, in conversations that were later used as evidence in a hearing on the government's motion to set aside his guilty plea.

In *Maine v. Moulton*, after Colton and Moulton were indicted for theft, Colton told police of Moulton's suggestion a state witness be killed and agreed to record later conversations with Moulton. The recorded conversations thereafter obtained, in which Moulton discussed the charged thefts, were admitted in his trial on those and other charges. The Court said that the police should have known that the discussion would produce incriminating statements about the offense for which the defendant had been indicted and that they knowingly circumvented Moulton's right to counsel.

On the other hand, the Court in *Maine v. Moulton* agreed that the fact that the defendant had been charged with one offense was no reason to give him immunity from the investigation of other, uncharged crimes, and thus concluded that "to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities."

Maine v. Moulton therefore allows an undercover agent to seek uncounseled admissions from a defendant under indictment for a charge if any only if the evidence obtained is employed in other, uncharged crimes. Britt contends that a hearing to set aside his plea to the charge under indictment (or in this case, charged by way of information) is not a proceeding involving another, uncharged crime, and that *Maine v. Moulton* therefore requires exclusion of the statements that Stevens recorded in that hearing.

It is important to note that, although the *Moulton* decision reaffirmed the importance of formal accusation as the point at which the right to counsel attaches, the Court also recognized that some technically distinct, formally charged offenses are actually so closely related to certain offenses for which formal charges have not been made that the right to counsel for the charged offense cannot constitutionally be isolated from the right to counsel for the uncharged offense. The Court recognized this by vacating *all* of defendant Moulton's convictions – burglary and theft – even though at the time of the surreptitious recording, formal charges on the burglary offense had not been commenced.

The Eighth Circuit, in the instant case, made no effort to explain why a hearing on a motion to set aside a guilty plea is unrelated to the offense charged and to which the plea was entered. It seems obvious that the hearing to set aside Britt's guilty plea to the conspiracy charge, to which the right to counsel had attached, was not separate and distinct from or unrelated to that conspiracy offense, and that Stevens' statements and recordings should have been excluded from introduction at the hearing because Britt's right to counsel was violated. The Supreme Court should grant certiorari to address the Court of Appeals' unjustifiable reading and application of *Maine v. Moulton*, and for relief, Petitioner requests that the matter be remanded to the district court for the Northern District of Iowa for rehearing and further proceedings in light of *Maine v. Moulton*.

II.

The Supreme Court should grant certiorari to review a holding that a plea agreement, drafted by the government after *Ricketts v. Adamson* was decided, authorizes the trial court to set aside the Defendant's guilty plea to a felony drug conspiracy charge, and the government thereafter to file a more serious charge, under the following circumstances – the plea agreement contains no provision that the Defendant, in the event of a breach of his obligations under the plea agreement, waives his right to be twice placed in jeopardy or that a more serious charge will be substituted, but instead, by way of remedy for a breach by the Defendant, provides that the plea agreement is null and void and the government is relieved of its obligations under the agreement and may use Defendant's statements to file new charges – because such an agreement is not precisely equivalent to a waiver of double jeopardy rights.

The plea agreement imposed upon Britt several obligations, including providing information, engaging in

undercover work for the government, forfeiting property, and pleading guilty to a felony drug conspiracy charge. The agreement provided that:

> 3. . . . [Britt's] failure to provide truthful information will render this agreement void.
>
> 5. . . . If the totality of the circumstances convinces the government that his statement is not complete and truthful, he will be so informed and any and all obligations imposed on the government by this agreement will be rendered null and void.
>
> 12. . . . If [Britt] violates the terms of this agreement, any such testimony of other information provided by him at any time to attorneys or law enforcement officers of the government, or the federal grand jury, may and will be used against him. No statements or other information provided by him shall be deemed to be precluded from use against him in the case of his breach of this agreement.

In *Ricketts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987), a plea agreement specified that if Ricketts did not testify at the trial of two co-defendants, which was the only obligation imposed by the bargain, then "this entire agreement is null and void and the original [first degree murder] charge will automatically be reinstated." Furthermore, the agreement stated that "in the event this agreement becomes null and void, then the parties shall be returned to the position they were in before this agreement." 483 U.S. at page 9.

The Eighth Circuit, in Britt's case, said that the waiver of Rickets' right not to be twice placed in jeopardy arose out of the null and void language that is also present in Britt's plea agreement. *United States v. Britt*,

917 F.2d 353, 358 ("The waiver in *Ricketts*, in fact, arose out of the 'null and void' language that is also in Britt's plea agreement. See *Ricketts*, 483 U.S. at 9-10."). This conclusion does not comport with what the Supreme Court said in *Ricketts*. As evidenced by the passages from *Ricketts* which are reproduced below, it was not the "null and void" language, but the "*status quo ante*" provisions of the agreement, and the provisions automatically reinstating the original charge, which were found to waive Ricketts' double jeopardy rights under the 5th Amendment and authorize the government's reinstatement of the original charges against him. That is, in *Ricketts*, 483 U.S. at page 9, the Supreme Court noted that:

> Paragraph 5 provides that if the respondent refused to testify, "this entire agreement is null and void and the original charge will be *automatically* reinstated." (emphasis added by the Supreme Court). Similarly, Paragraph 15 of the agreement states that "[i]n the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before the agreement."

After noting that Ricketts unquestionably understood the meaning of these provisions, the court stated that it was not significant that double jeopardy was not specifically waived by name in the plea agreement. Then, at 483 U.S. 10, the court concluded that:

> The terms of the plea agreement could not be clearer: in the event of respondent's breach occasioned by a refusal to testify, the parties would be returned to the *status quo ante*, in which case respondent would have no double jeopardy defense to waive. And, an agreement specifying that the charges may be reinstated given certain circumstances, at least under the

> provisions of this plea agreement, *precisely* equivalent to an agreement waiving a double jeopardy defense. (emphasis in the original)

These passages from *Ricketts* point to the "status quo ante" and "charge reinstatement" provisions of the agreement that came into play once the agreement was voided as the provisions that operated as a double jeopardy waiver. Since Britt's agreement does not contain such provisions, the "null and void" language that is in this agreement is not sufficient to constitute a waiver, despite the Eighth Circuit's contrary finding.

The Eighth Circuit also found a waiver of double jeopardy rights in those portions of Britt's agreement authorizing the government to use his statements against him and to file additional charges against him in the event of a breach. However, an agreement that the government may file additional charges – for instance, perjury or obstruction of justice charges, or other charges based on admissions Britt made – is not precisely equivalent to an agreement that a guilty plea to an offense, once entered, could be set aside and replaced by a more serious charge based on the same conduct.

Since Britt's agreement contains no *status quo ante* provisions, nor any other language that expressly waives his right not to be twice placed in jeopardy or which is precisely equivalent to a waiver of double jeopardy rights, then, unlike the *Ricketts* case, there is nothing in the plea agreement that allows the guilty plea to be set aside.

Only an agreement that is precisely equivalent to an express waiver will suffice to waive the right not to be

twice placed in jeopardy because waiver is not lightly presumed; the trial judge must indulge every reasonable presumption against waiver. *Boyd v. Dutton*, 405 U.S. 1, 30 L.Ed.2d 755, 92 S.Ct. 759 (1971). In *Johnson v. Zerbst*, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1461 (1937) the Supreme Court held that the record must establish "an intentional relinquishment or abandonment of a known right or privilege" to establish waiver of a fundamental right.

Also, as a matter of standard contractual law, a plea agreement being contractual in nature, see, e.g., *Santobello v. New York*, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971), a contract is normally to be construed and given effect pursuant to the law of the state of performance. See, e.g., *Pfaudler Co. v. American Beef Packing Co.*, 338 F.Supp. 701 (DC Iowa 1972). Britt's plea agreement was drafted in Iowa, by the government. Iowa law, like the law in other jurisdictions, is that any ambiguity as to remedies available to the parties should be construed against the party that drafted the contract. *Webb v. Lake Mills Community School District*, 344 F.Supp. 791 (DC Iowa 1947).

Not only did the government draft the agreement, it did so several months after *Ricketts v. Adamson* was decided. The government thus had the benefit of clear guidance regarding what type of provisions to include in a plea agreement if there were to be a waiver of Britt's right not to be twice placed in jeopardy, yet no such provisions were set out therein.

Finally, the government knew or believed that Britt was not being entirely truthful from the first time he was interrogated, almost a year before his plea was entered,

but, even after Britt pled guilty and was debriefed to testify against Stevens, the government ignored his untruthfulness. Agent Dudley, the chief investigator in the case complained, at the hearing on the motion to set aside Britt's plea, that much of the time spent with Britt from the time of his arrest was trying to "coax the truth out of him," that Britt feigned memory lapses, and that he remembered things differently from one time to another, even at the pretrial interview before the government called Britt to testify against Stevens.[8]

Restatement of Contracts 2d, Section 246, provides in part that:

> An obligor's acceptance . . . of the obligee's performance, with knowledge or reason to know of the nonoccurrence of a condition of the obligor's duty, operates as a promise to perform in spite of that nonoccurrence.

Therefore, the contract principle of election may be invoked. Under this principle of election, the government has waived any right to later challenge the plea.

Conclusion

In *Ricketts*, the Supreme Court found the precise equivalent of an express waiver of Ricketts' double jeopardy rights, not in provisions declaring that agreement null and void in the event of Ricketts' breach, but in specific language that the original charge would be reinstated and the parties returned to the *status quo ante*. Since the government drafted Britt's agreement without

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[8] This testimony is set out in the Appendix, at pages 51, 52.

including similar provisions, even though *Ricketts v. Adamson* had been previously decided, the Court of Appeals erred by holding that Britt had waived his right not to be twice placed in jeopardy. Furthermore, the government knew or suspected Britt was being untruthful, before and after he entered his guilty plea, but ratified Britt's conduct by accepting it or ignoring it and continuing to use Britt for its own purposes, including holding him out to the jury as a witness who could be believed in Stevens' trial. The Supreme Court should therefore grant certiorari to review his case in light of *Ricketts v. Adamson* and those cases holding that a waiver of a constitutional right may not be inferred but must be clear from the record.

III.

The Supreme Court should grant certiorari to review a holding that a defendant waives his Sixth Amendment right not to be twice placed in jeopardy by materially breaching the terms of his plea agreement because constitutional rights are not subject to ad hoc approval by individual district court judges, and to resolve conflicts in principle among the lower courts.

Both the district court and the Eighth Circuit Court of Appeals held that a judge may set aside a guilty plea to a charge if the judge determines that to do so furthers the public's interest in just judgments, and that the double jeopardy clause of the Fifth Amendment is no bar to such a procedure.

Specifically, the district court held that:

> The court holds that a district court has the power to vacate a previously accepted plea of

> guilty after a defendant materially and substantially breaches the plea agreement upon which the plea is based.

The Eighth Circuit's proposition was:

> To allow the Double Jeopardy Clause to shield Britt from prosecution on more severe drug charges after he purposefully attempted to deceive government agents and concealed evidence at the trial of a codefendant would be a grave injustice.

The Eighth Circuit held that this perceived "grave injustice" created a "manifest necessity" to ignore Britt's right not to be twice placed in jeopardy. *United States v. Britt*, 917 F.2d 353, 359.

The Supreme Court has consistently adhered to the principle that a plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and to determine punishment. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). This principle was recently reaffirmed in *United States v. Broce*, 488 U.S. 563, 102 L.Ed.2d 927, 936, 109 S.Ct. 757 (1989). In *Broce*, the Supreme Court stated that when a defendant enters a guilty plea to a charge, he has undertaken an act that "comprehends all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *Broce*, 104 L.Ed.2d at 935.

Accordingly, that jeopardy attached when a plea of guilty is entered and accepted by the court is black letter law, 75 ALR 2d Anno. 683, Section 3, "General rule that plea of guilty constitutes basis for double jeopardy"; W. LaFave and J. Israel, 3 *Criminal Procedure* Section 24.1 at

64 (1984) (citing cases) and this is the rule in the majority of the federal courts of appeals. *Fransaw v. Lynaugh*, 810 F.2d 518, 523 (5th Cir. 1987).[9]

The Eighth Circuit's holding in Britt's case directly conflicts with the authority from the 4th Circuit, which held, in *Burgess v. Griffen*, 585 F.Supp. 1564 (DCNC 1984), aff'd 743 F.2d 1064 (4th Cir. 1984), that the attachment of jeopardy when the court accepted the plea has a legal effect independent of the plea agreement, and any later status of the agreement cannot purge the legal effect; thus any alleged breach of the plea agreement by either side had no effect on the defendant's conviction. Burgess relied on *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). The Eighth Circuit's holding in Britt's case is also inconsistent with a recent case from the 9th Circuit, *United States v. Partida-Parra*, 859 F.2d 629 (9th Cir. 1988), where the court of appeals held that the district court had no authority to set aside a guilty plea that a defendant entered to a misdemeanor drug offense. The government contended that the parties intended that the plea would be to a felony. Possibly, justice would have been more effectively administered if

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[9] In footnote 9, the following cases adopting the majority rule are listed, as follows: *United States v. Hecht*, 838 F.2d 651, 657 (3d Cir. 1981); *United States v. Cambindo Valencia*, 609 F.2d 603, 637 (2nd Cir. 1979), cert. denied 446 U.S. 940, 100 S.Ct. 2163, 64 L.Ed.2d 795 (1980); *United States v. Bullock*, 579 F.2d 1116, 1118 (8th Cir.), cert. denied 439 U.S. 967, 99 S.Ct. 456, 58 L.Ed.2d 425 (1978); *United States v. Vaughn*, 715 F.2d 1373, 1378, n.2 (9th Cir. 1983); *United States v. Cruz*, 709 F.2d 111, 112-14 (1st Cir. 1983); *But See United States v. Combs*, 634 F.2d 1295 (10th Cir. 1980), cert. denied 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 304 (1981).

the guilty plea to the misdemeanor had been set aside in that case, but such considerations are irrelevant, because, even though the defendant benefited from the government's mistake, jeopardy had attached upon entry of the plea, and the interest in finality and avoiding serial prosecutions supersedes all competing interests.

The Supreme Court has indicated that a guilty plea is tantamount to a jury verdict of guilty. *Kercheval v. United States*, 274 U.S. 220, 223, 47 S.Ct. 582, 71 L.Ed. 1009 (1927) (the judge's acceptance of a guilty plea is analogous to a jury verdict). The proper analogy for application of the manifest necessity doctrine in the context of a guilty plea would be where a court finds that a guilty plea lacks a factual basis; this would constitute a manifest necessity for a full trial to determine the guilt or innocence of the accused. *United States v. Combs*, 634 F.2d 1295, 1301 n.1 (dissent) (10th Cir. 1980), cert. denied 451 U.S. 913 (1981).

None of the rules of criminal procedure grant a judge the authority to set aside a guilty plea if it seems fair to the judge to do so. The rules that are applicable, Rule 32(c) and Rule 11(e)(3), allow for a plea to be vacated only upon the motion of the defendant, and then only where a fair and just reason is shown.

In its opinion in *United States v. Britt*, the Eighth Circuit found that "the District Court's action fell well within its inherent power to protect the integrity of the judicial process."[10] In a recent case involving the question

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[10] *United States v. Britt*, 917 F.2d 353, 355, fn. 2.

of the federal courts' supervisory power the United States Supreme Court said that:

> . . . it is well established that "even the sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." [citation omitted]

Bank of Nova Scotia v. United States, 487 U.S. 250, 108 S.Ct. 2369, 2378, 30 L.Ed.2d 427 (1988). Applying this holding to Britt's case leads to the conclusion that the supervisory power of a trial court judge provides a judge with no authority strip from a defendant the protection of the Fifth Amendment's right not to be twice placed in jeopardy.

There are at least two other reasons why the Supreme Court should review the Eighth Circuit's determination that the imperative of fairness or justice or preserving judicial integrity provides a basis for setting aside Britt's guilty plea.

First, in instances where the government has broken the law, the courts have not invariably denied aid to the government by excluding evidence from trial. The exclusionary rule is subject to a number of exceptions, and third parties have been consistently denied standing to assert the exclusionary rule. Therefore, one commentator has concluded, these exceptions to the exclusionary rule weaken the claim that the judiciary must disassociate itself from misconduct, even where it amounts to violations of the law, in order to perform its Article III functions effectively. *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limitations on the Authority of the Federal Courts*, 84 Columbia L.R. 1433, 1507, 1508 (1984).

Second, where no provision of the Constitution, federal statute or procedural rule has been violated, there is no significant threat to judicial integrity. See 84 Columbia L.R. at 1508, n. 452, citing *United States v. Janis*, 428 U.S. 433, 458 n. 35, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976) ("The primary meaning of judicial integrity in the context of evidentiary rules is that the court must not encourage violations of the Constitution.") To allege that Britt was not completely truthful, and that he lied to the government, is not in and of itself to allege that he violated the law; and, to the extent that such conduct constituted a crime, such as perjury or obstruction of justice, the government can avail itself of the remedy of criminal prosecution. Therefore, there is, under the facts of this case, no significant threat to judicial integrity.

Finally, even if there were a "manifest necessity" exception to the double jeopardy clause in the case of guilty pleas, this would not be the case to find such a necessity. There are substantial questions about the government's conduct in this case. It is important to point out that the government, even though it suspected from the start that Britt might not have been telling the whole truth, a point previously addressed at page 13, *supra*, continued to use him as an informant and witness.

No court, prior to the Eighth Circuit's decision in *United States v. Britt*, has ever set aside a plea and forced a defendant to again be placed in jeopardy on the authority of its supervisory power, that is, ostensibly to further fairness or justice; such power cannot be exercised because it would run afoul of a constitutional guarantee, a defendant's right not to be twice placed in jeopardy, a

right that attaches upon entry of a guilty plea and the court's unequivocal acceptance of the plea.

CONCLUSION

Wherefore, Petitioner prays that his Petition for a writ of certiorari be granted.

Respectfully submitted,

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Attorneys for Petitioner

No. _____

In The

Supreme Court of the United States

October Term, 1990

MIKE BRITT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The Eighth Circuit Court Of Appeals

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2719

United States of America, Appellee, v. Michael Britt, Appellant.	* * * * * * * * * *	Appeal from the United States District Court for the Northern District of Iowa.

Submitted: June 11, 1990
Filed: October 10, 1990

Before ARNOLD, BOWMAN, and WOLLMAN, Circuit Judges.

BOWMAN, Circuit Judge.

Michael Britt appeals from the order of the District Court[1] vacating his guilty plea. The government moved before sentencing to vacate Britt's guilty plea after learning that Britt had not complied with the terms of the plea

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[1] The Honorable Edward J. McManus, United States Senior District Judge for Northern District of Iowa.

agreement pursuant to which he pled. Specifically, the government alleged that Britt did not disclose the full extent of his drug dealings, plotted with codefendants to conceal drug trafficking activity, and testified untruthfully at the trial of his codefendant Daniel Stevens. After an evidentiary hearing, the District Court, concluding that Britt had materially breached his plea agreement, granted the government's motion to set aside Britt's guilty plea. On appeal, Britt argues: (1) setting aside his guilty plea and charging him with a more serious drug crime violated the Double Jeopardy Clause and principles of contract law applicable to plea agreements; and (2) the District Court relied on improper and unconstitutionally obtained evidence in its decision.[2] We affirm.

I.

Britt was arrested on December 12, 1987, while attempting to purchase 150 to 300 pounds of marijuana from a cooperating government informant. He negotiated a plea agreement in which he agreed to plead guilty to one count of conspiracy to distribute and possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a) (1), 846 (1988). In return for the government's

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[2] Britt also argues that because the Federal Rules of Criminal Procedure have no specific provision authorizing a district court to grant the government's motion to vacate a defendant's guilty plea, the District Court did not have the power to vacate Britt's guilty plea. We disagree and believe the District Court's action fell well within its inherent power to protect the integrity of the judicial process.

promise to file no additional Title 21 criminal charges, Britt pledged to "fully and completely cooperate with the United States in its investigation into the use, possession, and trafficking of controlled substances and related criminal activity within the Northern District of Iowa and elsewhere." Appellant's Appendix at A-1 (Initial Plea Agreement at ¶ 2). Britt also agreed to forfeit all property gained through or associated with drug trafficking. *Id.* at A-3 (Initial Plea Agreement at ¶ 6). The agreement was signed by the parties and their counsel on January 6, 1988, and Britt entered his guilty plea on November 3, 1988.

Over the course of the year, Britt had several debriefing meetings with federal agents, made recorded phone conversations to other suspected drug traffickers, participated in at least one controlled buy in which his seller was arrested, and testified at the trial of Daniel Stevens. In his interviews with law enforcement agents, Britt repeatedly denied any involvement in a marijuana transaction in Grand Junction, Colorado, a location mentioned by Britt in a tape-recorded conversation made during the attempted sale leading to his arrest. Britt denied having any marijuana dealings with Chris Batten and denied any knowledge of Batten's marijuana trafficking. Britt repeatedly maintained that the December 12, 1987 transaction was his only marijuana transaction with Stevens and denied any knowledge of marijuana trafficking by individuals in the state of Mississippi. At Stevens' trial, Britt testified truthfully regarding Stevens' involvement in the December 12 transaction but did not reveal his knowledge of Stevens' previous marijuana dealings.

On November 22, 1988, Britt was interviewed by an agent of the federal Drug Enforcement Administration (DEA) as part of an independent investigation conducted by the DEA. In that interview, Britt admitted for the first time extensive involvement with several other suspected drug traffickers in Mississippi and Louisiana. Britt made these admissions only after the agent told Britt that another drug dealer had provided the DEA with information concerning Britt's dealings in Mississippi. On December 12, 1988, Stevens, who was convicted at trial, contacted law enforcement agents and told them that Britt had perjured himself at Stevens' trial and had repeatedly lied to investigators. Specifically, Stevens stated: (1) Britt and Batten were involved in extensive marijuana dealings; (2) Britt received marijuana from a source in Louisiana and one in the country of Belize; (3) Britt was involved in a marijuana transaction in Grand Junction, Colorado; and (4) contrary to his claims, Britt knew an individual named Frank Conrad, a suspected marijuana dealer. Stevens told the agents that he and Britt met on several occasions after their initial arrest and agreed to conceal the extent of their drug dealings. Britt gave Stevens a substantial amount of cash to use to hire an attorney with the implied understanding that in return Stevens would remain quiet.

On December 13, 1988, Britt submitted to a polygraph examination at the government's request. In the opinion of the examiner, Britt failed to respond truthfully to questions regarding his drug dealings with Stevens and Batten and the forfeiture of assets. In the interview following the examination, Britt admitted that he might have withheld certain assets but steadfastly maintained

that he had been completely truthful regarding his marijuana dealings with Stevens and Batten. On January 12, 1989, Stevens wore a body recorder to Britt's home and recorded Britt bragging that he had perjured himself at Stevens' trial and had lied to the agents. Britt continued to implore Stevens to conceal the Colorado marijuana transaction.

On December 29, 1988, the government informed Britt that it considered him to have violated his plea agreement and intended to seek additional or alternate charges against him. The government moved to vacate Britt's plea and, after an evidentiary hearing in June 1989, the District Court found that Britt had materially breached his plea agreement and granted the government's motion to vacate his guilty plea. The government then filed a second information against Britt charging him with the same count of conspiracy to distribute marijuana as before but this time alleging that the quantity of drug involved was more than fifty kilograms. This changed the maximum penalty to which Britt was subject from five years to between 210 and 262 months in prison. Britt entered a conditional plea of guilty on this count reserving his right to appeal the vacating of his first guilty plea to this Court.

II.

We are presented with the question of whether a defendant's failure after his guilty plea is entered to fulfill his obligations under his plea agreement releases the government from its bargain and entitles it to bring additional charges against the defendant. Britt argues

that setting aside his guilty plea and allowing the government to file a more severe drug charge against him violated the Double Jeopardy Clause.[3] We conclude that in these circumstances the Double Jeopardy Clause does not bar the setting aside of Britt's guilty plea and the filing of a more serious drug charge against him.

Several federal courts of appeals have approved the setting aside of plea agreements and guilty pleas in circumstances similar to those in this case with no suggestion that such action implicates a defendant's right not to be twice placed in jeopardy. *See, e.g., United States v. Ataya*, 864 F.2d 1324 (7th Cir. 1988) (after pleading guilty to two counts of an indictment, defendant refused to testify at codefendant's retrial; this was breach of plea agreement and government is no longer barred from seeking reindictment of defendant on all counts); *United States v. Gonzalez-Sanchez*, 825 F.2d 572 (1st Cir.) (defendant's failure to testify fully and honestly released government from its obligation under plea agreement not to prosecute defendant), *cert. denied*, 484 U.S. 989 (1987); *United States v. Reardon*, 787 F.2d 512 (10th Cir. 1986) (defendant pled guilty to one count of attempting to possess cocaine and then failed to give truthful accounting of cocaine trafficking as required by plea agreement; government was justified in indicting defendant on the original counts and two additional counts the facts of which defendant related to agents during the course of

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[3] We assume for purposes of this discussion that jeopardy attached when Britt's guilty plea was accepted by the court. *See United States v. Bullock*, 579 F.2d 1116, 1118 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978).

his plea negotiations); *United States v. Wood*, 780 F.2d 929, 930 (11th Cir.) (defendant's breach of plea agreement which provided that "Government will be free from its obligations" if defendant did not comply with agreement's terms entitled government to reinstate original indictment), *cert. denied*, 479 U.S. 824 (1986); *United States v. Baldacchino*, 762 F.2d 170 (1st Cir. 1985) (defendant's failure to fully and honestly cooperate with government entitled government to reindict defendant); *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir.) ("It is clear that a defendant's failure to fulfill the terms of a pretrial agreement relieves the government of its reciprocal obligations under the agreement."), *cert. denied*, 451 U.S. 1018 (1981) (citations omitted). In general, these cases accept as obvious the principle that a defendant must be compelled to abide by his plea agreement both before and after his plea is entered and that in order to do so the government must have the option of moving to vacate a noncomplying defendant's guilty plea and instituting more severe charges.

The Supreme Court has addressed the double jeopardy implications of vacating a guilty plea and reinstituting the original charges in *Ricketts v. Adamson*, 483 U.S. 1 (1987). The defendant in *Ricketts* had agreed to plead guilty to second-degree murder and to testify against other individuals in return for a specified prison term. When the convictions of the defendant's accomplices were overturned on appeal, the state ordered the defendant, who was already serving his sentence, to testify at the second trial. The defendant refused to testify, maintaining that his obligation under the agreement was complete. The state then tried and convicted him on a first-

degree murder charge. A federal court of appeals eventually found that the state had violated the defendant's double jeopardy rights and overturned his conviction. In reversing the judgment of the court of appeals, the Supreme Court held that provisions of the plea agreement declaring the agreement "null and void" and automatically reinstating the original charge in the event of defendant's breach were equivalent to an express waiver of a double jeopardy defense. *Ricketts*, 483 U.S. at 9-10. Further, a provision which stated the parties would return to their original positions prior to the agreement in case of breach by the defendant operated to return the parties to the *status quo ante*, in which case the defendant had no double jeopardy defense to waive. *Id.* at 10. The Court reasoned that to hold these provisions to mean otherwise "would render the agreement meaningless" and allow the defendant to refuse to honor his obligations under the agreement with impunity. *Id.*

We conclude that here, as in *Ricketts*, the defendant has waived his double jeopardy defense in the plea agreement he signed. The plea agreement provides in pertinent part:

> 3. Mr. Britt will provide complete and truthful information to the attorneys and law enforcement officers of the government, and the federal grand jury conducting this investigation . . . Since the United States insists upon Mr. Britt telling the truth and nothing but the truth during this investigation and in the event he should be called as a witness, *his failure to provide truthful information will render this agreement void.*
>
> . . .

> 5. It is understood that, upon request by the government, Mr. Britt will voluntarily submit to a polygraph examination . . . *If the totality of circumstances convinces the government that his statement is not complete and truthful, he will be so informed and any and all obligations imposed on the government by this agreement will be rendered null and void.*
>
> . . .
>
> 12. If he violates the terms of this agreement, any such testimony or other information provided by him at any time to attorneys or law enforcement officers of the government, or the federal grand jury, may and will be used against him. No statements or other information provided by him shall be deemed to be precluded from use against him in the case of his breach of this agreement.

Appellant's Appendix at A-2, A-3, A-5 (Initial Plea Agreement at ¶¶ 3, 5, 12) (emphasis added).

Britt argues that because his plea agreement contains no *status quo ante* provisions expressly reinstating the original drug charges or returning the parties to their original positions, he did not waive his double jeopardy rights. We disagree. *Ricketts* does not stand for the proposition that only those plea agreements with a *status quo ante* provision will be held to waive a defendant's double jeopardy rights. The waiver in *Ricketts*, in fact, arose out of the "null and void" language that is also present in Britt's plea agreement. *See Ricketts*, 483 U.S. at 9-10. *Ricketts* supports the position that language in a plea agreement will be given its ordinary, logical meaning and a defendant can waive his double jeopardy rights even

when the phrase "double jeopardy" does not appear anywhere within the agreement. *Ricketts*, 483 U.S. at 9-10.

The language of Britt's plea agreement is clear: if Britt is not completely truthful in the information he gives to law enforcement agents "all obligations imposed on the government by this agreement will be rendered null and void," Appellant's Appendix at A-3 (Initial Plea Agreement ¶ 5), and "any such testimony or other information provided by him at any time . . . may and will be used against him." *Id.* at A-5 (Initial Plea Agreement at ¶ 12). As the Court in *Ricketts* suggested, the terms "null and void" can mean only that the government's obligations – chiefly, not to file additional charges – are dissolved, leaving the government free to bring any charges it chooses. Moreover, the agreement specifically provides that if Britt violates its terms the government may use against him any and all information provided by him to government attorneys or law enforcement officers. We believe the government bargained for more here than did the state in *Ricketts*; Britt's breach did not merely reinstate an earlier charge, but rather allowed the government to use Britt's own admissions against him in filing more severe charges.

In addition, and as an alternative ground for our decision, we believe that analogous to the situation where a mistrial has been declared over the defendant's objection, the reprosecution of Britt is not precluded if his guilty plea was set aside because of "manifest necessity." *See Arizona v. Washington*, 434 U.S. 497, 505 (1978). As applied to the mistrial situation, the Double Jeopardy Clause protects two principal interests.

> First, individuals should be spared the emotional and financial hardship of successive prosecutions at the powerful hand of the State. Second, defendants must be protected from the unfairness of a mistrial declaration designed to give the government a second chance to convict when the first is going badly.

Lovinger v. Circuit Court of the 19th Jud. Circuit, 845 F.2d 739, 743 (7th Cir.), *cert. denied*, 488 U.S. 851 (1988) (citations omitted). These important interests must be weighed against "the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). Courts' efforts to balance these conflicting goals has led to the general rule that when a mistrial is declared over a defendant's objection, reprosecution of the defendant is not barred if the trial was terminated out of "manifest necessity." *Arizona*, 434 U.S. at 505. We believe a similar standard is appropriate in reviewing the District Court's decision to vacate Britt's guilty plea.

The phrase "manifest necessity" does "not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." *Arizona*, 434 U.S. at 506. Here, the District Court was confronted with a defendant who, after his guilty plea was accepted but prior to sentencing, willfully failed to fulfill his obligations under the plea agreement pursuant to which he pled. To allow the Double Jeopardy Clause to shield Britt from prosecution on more severe drug charges after he purposefully attempted to deceive government agents and concealed evidence at the trial of a codefendant would be a grave injustice. "[T]he Double Jeopardy Clause . . . does not relieve a defendant from the

consequences of his voluntary choice," *Ricketts*, 483 U.S. at 11 (quoting *United States v. Scott*, 437 U.S. 82, 99 (1978)), and the government here should not be bound by a plea entered pursuant to the terms of an agreement that the defendant himself chose to violate.

For the reasons discussed above, we hold that the Double Jeopardy Clause does not bar the setting aside of Britt's guilty plea and the filing of more serious charges against him.

III.

Britt argues that the District Court's decision to vacate his guilty plea violated contract law principles because: (1) Britt relied on the plea agreement; (2) the government waived its right to complain of Britt's untruthfulness by allowing him to plead guilty and accepting his testimony at Stevens' trial; and (3) the government's sole remedy under the plea agreement for Britt's untruthfulness is to prosecute him for perjury. We disagree with each of these contentions.

At the outset we note that Britt does not directly challenge as clearly erroneous the District Court's finding that he materially breached his plea agreement, although throughout his brief he emphasizes the extent of his cooperation with the government. The District Court's finding that Britt materially breached the agreement by withholding information regarding his own and others' drug trafficking is amply supported by the record and our consideration of Britt's claims is premised on this finding.

A plea agreement is contractual in nature and generally governed by ordinary contract principles. *United States v. Brown*, 801 F.2d 352, 354 (8th Cir. 1986). A plea agreement is more than merely a contract between two parties, however, and must be attended by constitutional safeguards to ensure a defendant receives the performance he is due. *Santobello v. New York*, 404 U.S. 257, 262 (1971). Britt's attempt to use contract principles of fairness and equity to enforce the government's obligations under his plea agreement fails because Britt himself is the breaching party.

It is disingenuous of Britt to argue that he "relied" on the plea agreement in testifying against Stevens, participating in a controlled buy, and making several recorded phone calls to suspected drug traffickers. This is exactly the performance that the agreement contemplated and Britt was fully aware of the government's expectations when he entered his plea of guilty. *See United States v. Coon*, 805 F.2d 822, 825 (8th Cir. 1986) ("The only change in position that can be considered 'detrimental reliance' is the actual entry of an involuntary guilty plea."). Britt also understood that the agreement obligated him to testify truthfully and to make full disclosure of what he knew; this he did not do. He now is in the untenable position of arguing that in performing a portion of the cooperation required by his plea agreement he detrimentally relied on the government's inability to discover his deceitfulness and dishonesty in his nonperformance of his remaining obligations.

Britt's argument that he substantially performed his obligations under the agreement and that the government's obligations cannot be dissolved because it

received considerable benefit from his performance is similarly unpersuasive. First, Britt's breach of the agreement cannot be considered minor; as the District Court found, Britt repeatedly lied and concealed information regarding large-scale drug trafficking activity. Second, the fact that the government may have benefitted from Britt's partial performance does not bar the government from moving to vacate his guilty plea on the ground of his material breach of the plea agreement. *Brown*, 801 F.2d at 354-55 (reversing district court's ruling that government could not prosecute defendant for original offense because government had received benefits of defendant's cooperation and remanding with instructions that if district court found defendant had breached agreement government is no longer bound by agreement not to prosecute).

Britt next claims that the government waived its right to complain of his dishonesty when it allowed him to plead guilty and accepted his testimony in Stevens' trial when the government already suspected that Britt was not completely truthful in his debriefing sessions with law enforcement agents. *See United States v. Vogt*, 901 F.2d 100 (8th Cir. 1990) (holding that government waived its right to complain of defendant's breach when after defendant admitted to agents that he was lying, government called defendant to testify before a grand jury on two occasions and did not move to vacate defendant's plea until ten weeks after defendant's admissions of untruthfulness). The District Court here found, however, that Britt did "not come forward with any persuasive evidence that the government continued to solicit and/or accept the benefit of the bargain after it knew or should

have known of the breach." *U.S. v. Britt*, No. 89-2719, at 4 (order granting government's motion to vacate plea). This finding is not clearly erroneous. Britt did not admit of any dishonesty in his statements to agents until after entering his guilty plea and testifying at Stevens' trial and Stevens did not come forward with his evidence until after his trial and conviction. The day after Stevens informed the government of Britt's deceptions, the government ordered Britt to undergo a polygraph examination and approximately two weeks later informed Britt that it considered him to have violated his plea agreement. We do not believe that the government's actions constituted an unreasonable delay or a waiver of Britt's noncompliance.

Britt contends that the government's remedy for his untruthful statements is specified by the plea agreement and is limited to prosecution for perjury. In support of this claim, Britt points to the following language:

> 4. No testimony or other information provided by Mr. Britt to the United States Attorney's Office or law enforcement officers or the federal grand jury conducting this investigation, pursuant to this agreement, or any information directly or indirectly derived from such testimony or other information, will be used against him in a criminal trial, except in a prosecution for perjury or giving a false statement, *provided that Mr. Britt does not violate the terms of this agreement pursuant to which the grant of immunity is being made.*

Appellant's Appendix at A-2 (Plea Agreement at ¶ 4) (emphasis added). We believe that this provision is clear and does not support Britt's position. Britt's grant of immunity continues only so long as he abides by the

terms of the agreement. Once a breach occurs, the plea agreement and the government's obligations under it are dissolved and the government's remedy is no longer limited to criminal prosecutions for perjury.

We reject Britt's contention that contract principles bind the government to honor its obligations under the initial plea agreement despite his material breach of the agreement.

IV.

Finally, Britt claims that the District Court's decision to vacate his guilty plea was based on improper and unconstitutionally derived evidence. Specifically, Britt argues that the results of his polygraph examination should not have been admitted and the tape-recorded evidence gathered by Stevens after Britt's guilty plea violated Britt's Sixth Amendment right to counsel.

This Court has traditionally held "that polygraph examination results should not be admitted absent a stipulation." *Anderson v. United States*, 788 F.2d 517, 519 n.1 (8th Cir. 1986). At the hearing on the government's motion to vacate Britt's guilty plea the District Court admitted the results of the polygraph examination despite the contention of Britt's counsel that the federal rules of evidence applied to the hearing. The court stated that it was reserving its rulings on objections until a later time. There is no indication in the record as to what was the District Court's conclusion in this regard and there is no mention of the polygraph examination in the court's order. We do not now decide whether the federal rules of

evidence apply to this type of hearing because we conclude that any error committed by the District Court in admitting polygraph evidence was harmless. There was ample evidence aside from the polygraph examination to show that Britt did not provide complete and truthful information to law enforcement agents. In November 1988, Britt himself admitted to a DEA agent that he had concealed his involvement with significant drug trafficking activity. Stevens' testimony at the hearing before the District Court was extensive and detailed regarding Britt's attempts to deceive law enforcement agents and his perjury at Stevens' trial. Whatever weight may have been given to the results of the polygraph examination (and for all we know the District Court may not have given it any weight), we are satisfied that the exclusion of this evidence would have had no effect on the District Court's decision and that its admission was therefore harmless. *See United States v. Hawley*, 855 F.2d 595, 603 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 1141 (1989).

Britt's claim that Stevens elicited incriminating statements from Britt concerning the drug conspiracy to which Britt pled guilty in violation of Britt's Sixth Amendment right to counsel is without merit. After the right to counsel has attached with respect to one crime, the government may investigate a defendant without counsel as to "other crimes to which the Sixth Amendment right has not yet attached." *Maine v. Moulton*, 474 U.S. 159, 180 n.16 (1985). To hold otherwise "would be essentially to immunize a defendant from further prosecution." *United States v. Nocella*, 849 F.2d 33 (1st Cir. 1988) (quoting *United States v. Batista*, 834 F.2d 1, 4 (1st Cir. 1987)). As the District Court found, when the government sent Stevens to

record his conversation with Britt "the government sought to investigate [Britt] as to perjury and obstruction of justice." *U.S. v. Britt*, No. 89-2719, at 3 (order granting government's motion to vacate plea). The purpose of the hearing at which Britt's recorded statements were introduced was to prove that Britt lied to agents concerning his participation in drug trafficking crimes and that he committed perjury at Stevens' trial. These matters clearly are distinct from the drug conspiracy to which Britt had pled guilty. While the tape-recorded statements could not be introduced at a proceeding designed to prove that Britt had conspired to distribute marijuana, they were properly admitted to demonstrate that Britt had breached his plea agreement and perjured himself. Britt's Sixth Amendment right to counsel therefore was not violated by the introduction of his recorded statements at the hearing on the government's motion to vacate his plea agreement.

V.

Finding no merit in any of Britt's claims, we affirm the order of the District Court vacating Britt's plea agreement and guilty plea.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	NO. CR 88-0075
vs.	)	ORDER
MICHAEL BRITT, Defendant.	)	(Filed Aug 7 1989)

This matter is before the court on plaintiff's resisted Motion to Vacate Plea Agreement and Guilty Plea, filed February 16, 1989, and defendant's unresisted Motion to Amend or Revoke Detention Order, filed June 28, 1989. Plaintiff's Motion to Vacate Plea Agreement and Plea granted. Defendant's Motion to Amend or Revoke Detention Order denied.

Pursuant to a plea bargain signed on January 6, 1988 (government exhibit 2), defendant Britt pled guilty to an Information charging him with conspiracy to distribute and possess with the intent to distribute marijuana. In so pleading, Britt exposed himself to substantial penalties including a potential term of imprisonment of not more than five years and a fine not to exceed $250,000.

Plaintiff asserts that defendant breached the plea bargain by failing to provide complete and truthful information and cooperation as required by the bargain. Plaintiff seeks to have the plea of guilty and the plea bargain vacated. This matter came on for hearing on June 8, 1989 and June 19, 1989. Briefs and arguments have been received and considered.

The court finds that plaintiff has proven by a preponderance of the evidence that defendant materially and substantially breached the plea bargain by his failure to provide complete and truthful information and cooperation. Specifically, while required to provide truthful testimony at the trial of CR88-28, *United States v. Daniel Stevens*, and in accordance with a prearranged plan with Stevens, Britt lied about the extent of his drug deals with Stevens.

Defendant raises several issues in resisting this motion. Each shall be addressed in turn.

Defendant contends that the information which led to his detention and upon which the motion to vacate is based was obtained in violation of his Sixth Amendment right to counsel. Specifically, defendant asserts that jeopardy attached upon his plea of guilty, and he contends that Daniel Stevens thereafter acted as a government agent and elicited and recorded incriminating statements from defendant.

Even after the right to counsel has attached with respect to one crime, the government may investigate a defendant without counsel as to "other crimes to which the Sixth Amendment right has not yet attached." *Maine v. Moulton*, 474 U.S. 159, 180 n. 16 (1985). To hold otherwise would essentially immunize the defendant from further prosecution. *See United States v. Nocella*, 849 F2d 33, 36-37 (1988), citing *United States v. Batista*, 834 F2d 1, 4 (1st Cir. 1987). Here, the government sought to investigate defendant as to perjury and obstruction of justice. Defendant's argument is therefore without merit.

Defendant next urges that he has thus far rendered such substantial cooperation that the government should not be permitted to vacate the bargain and plea. He contends that the government is barred by his detrimental reliance upon its "promise," i.e., the plea bargain. Moreover, defendant argues that it would be fundamentally unfair to vacate the plea and bargain after his substantial cooperation.

While a plea agreement is not simply a contract between two parties, contract principles provide a useful means by which to analyze the enforceability of plea agreements. *Ricketts v. Adamson*, 97 LEd2d 1 (1987), (Brennan, J., dissenting); *United States v. McGovern*, 822 F2d 739, 743 (8th Cir. 1987), *cert. denied*, 98 LEd2d 377. Detrimental reliance is a theory of fairness where reliance on a promise is a ground for enforcement of the promise. *See generally Corbin on Contracts*, Reliance on a Promise, §193 *et seq.* (1963). However, neither the theory nor the cases cited by defendant have any application where, as here, the defendant breached the bargain. *See United States v. Plisek*, 657 F2d 920, 924 (7th Cir. 1981) (Defendant may not rely on government's continued compliance with bargain after defendant breaches). Moreover, notwithstanding the fact that defendant did render some cooperation, this court's sense of fundamental fairness is not offended by vacating the bargain and plea after defendant Britt deliberately lied in keeping with a plan to minimize his own drug involvement and that of others.

Next, Britt urges that the Government waived any right to complain of a breach by continuing to accept the benefit of the bargain after learning of the breach.

Britt has not come forward with any persuasive evidence that the government continued to solicit and/or accept the benefit of the bargain after it knew or should have known of the breach. Britt merely asserts that the government suspected his statements were incomplete or untruthful prior to his plea and his testimony in the Stevens trial. In the course of its efforts to curtail the activity of drug merchants, the government undoubtedly is frequently faced with conflicting evidence as to the acts of the subjects of its investigations. Absent defendant's coming forward with evidence showing the government continued to accept the benefits of the bargain after it knew or should have known that defendant breached the bargain, there is no waiver on the part of the government.[1]

Next, defendant urges that the court does not have the authority to vacate the plea. Defendant cites *United States v. Cannon*, 807 F2d 1528 (11th Cir. 1986), *cert. denied*, 98 LEd 2d 68, for the proposition that a guilty plea may be vacated only upon the motion of defendant. In *Cannon* the defendant pled guilty and the district court then imposed sentence without adjudicating the defendant's guilt, apparently in an effort to permit the defendant to legally retain hunting weapons. *Id.*, at 1528. The Court of

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[1] *Compare* Restatement (Second) of Contracts, §246, which provides in part:

> An obligor's acceptance . . . of the obligee's performance, with knowledge of or reason to know of the non-occurrence of a condition of the obligor's duty, operates as a promise to perform in spite of that non-occurrence. . . . "

Appeals held that the district court was without authority to sentence the defendant while withholding adjudication of guilt, and remanded the case. On remand the district court *sua sponte* set aside the defendant's guilty plea, ordered a new trial, and entered a judgment of acquittal when the government refused to proceed to trial. The Court of Appeals then held that in setting aside a valid guilty plea, the district court exceeded its authority under FRCrP 32. The *Cannon* court was not presented with anything resembling the facts of this case where the defendant breached the bargain by repeatedly lying. The *Cannon* court also noted that there had been no change in circumstances after the plea was accepted. In the instant case, of course, there was a substantial change: defendant's breach of the bargain.

In *United States v. Partida-Parra,* 859 F2d 629 (9th Cir. 1988), the court addressed the question of whether a district court has the authority, on the government's motion, to set aside a guilty plea which has been accepted by the court. In *Partida-Parra,* the defendant pled guilty to a misdemeanor charge of possession of heroin in violation of 21 USC §844. The government then moved to set aside the plea based on the contract theory of unilateral mistake, urging that the charging document contained a "clerical" error and should have charged defendant with felony possession in violation of 21 USC §841. After hearing, the district court set aside the plea. The Court of Appeals reversed, holding that the Federal Rules of Criminal Procedure did not give the court the authority to vacate a guilty plea on the government's motion. The court also concluded that where the defendant did not breach the agreement, the court was without "common

law" authority to set the plea aside. However, the court twice explicitly noted that the case before it did not involve a breaching defendant, and the holding was expressly so limited. *Id.*, at 634. The *Partida-Parra* dissent, agreeing with the majority that it was error to vacate the guilty plea, stated that upon rescinding the bargain the district court should instead have invited defendant to withdraw his guilty plea pursuant to FRCrP 32(d). *Id.*, at 637. *Cf. United States v. Reardon*, 787 F2d 512, 513 (10th Cir. 1986) (Upon approving revocation of plea agreement due to defendant's breach, and without addressing issue of court's power to vacate plea, court granted defendant five days to decide whether or not to withdraw his plea).

At the outset this court notes, as did the *Partida-Parra* court, that there is a dearth of authority on the question of whether a court has the power, on the government's motion, to set aside a previously accepted guilty plea. *United States v. Partida-Parra, supra*, 859 F2d at 632. A defendant's breach of a plea agreement provides the most compelling reason to set aside a guilty plea. The contrary authority submitted by Britt is distinguishable in that it did not involve a breaching defendant.

The court holds that a district court has the power to vacate a previously accepted plea of guilty after a defendant materially and substantially breaches the agreement upon which the plea is based. Central to the court's holding is the court's conclusion that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution would bar the government from adequate recourse against a breaching defendant unless the defendant withdraws or the court vacates the guilty plea. Here, the government seeks to have defendant's plea vacated so

that the government may proceed with a charge of conspiracy to distribute and possess with the intent to distribute more than fifty kilograms of marijuana. Unless the guilty plea is withdrawn or vacated, the Double Jeopardy Clause would prevent defendant from being charged with the distribution or conspiracy to distribute a larger amount of drugs than that initially charged for any single transaction.[2] *Cf. Ricketts v. Adamson, supra,* 97 LEd2d at 11 (1989) (after jeopardy attaches, Double Jeopardy Clause precludes prosecution for greater charge).

Plaintiff has now proven by a preponderance of the evidence that defendant repeatedly breached the bargain by failing to provide complete and truthful information and cooperation, including lying to the court. Pursuant to FRCrP 2, the Federal Rules of Criminal Procedure are intended to provide for the just determination of every criminal proceeding. Additionally, the court that accepts the plea based on the plea bargain has a duty to render justice not only to the parties, but to safeguard societal interests in the fair and effective administration of justice. *See United States v. McGovern, supra,* 822 F2d at 747. The Federal Rules of Criminal Procedure cannot be construed to permit a defendant to make his best bargain with the government, enter his plea, and then breach the bargain with impunity. To hold otherwise "would not square with the just administration of criminal law." *United States v.*

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[2] A breaching defendant has little incentive to move to withdraw a guilty plea and thereby risk being charged with distribution of more drugs than previously charged in the initial transaction, hence risking an increase in potential penalty.

McGovern, supra, 822 F2d at 747. Defendant's "substantial performance" argument has no applicability where, as here, defendant has violated a vital provision which goes to the very heart of the agreement, and where societal interests in the integrity of the criminal justice system require an absolutely scrupulous and above-board adherence to the terms of the bargain. Plaintiff's motion shall be granted.

Pursuant to 18 USC §3145(b), defendant seeks amendment or revocation of the Magistrate's June 19, 1989 order of detention wherein the Magistrate found the defendant violated the conditions of his release.[3] Specifically, the Magistrate found that there existed probable cause to believe defendant committed perjury, a federal felony. This factual finding is undisputed. Additionally, the Magistrate found that defendant threatened a federal agent and intended to obstruct justice by tampering with a witness.

Having reviewed the matter *de novo, see United States v. King,* 849 F2d 485 (11th Cir. 1988); *United States v. Maull,* 773 F2d 1479, 1481 (8th Cir. 1985), and based upon the evidence of record, especially the tape recording made by Daniel Stevens, the court finds that the Magistrate correctly determined that there is probable cause to believe defendant committed perjury. Accordingly, there arises a rebuttable presumption that no condition or combination of conditions will assure that defendant will not pose a

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[3] After appearing before the court on October 6, 1988, defendant was released on specific conditions, including a requirement that he not violate federal law while on release.

danger to the safety of any other person or the community. 18 USC §3148(b)(2)(B). The commission of this serious crime "is plainly indicative of defendant's inability to conform to one of the most basic conditions of his release, i.e., to abide by the law, and of the danger he poses to other persons and the community . . . " *United States v. Cook*, 1989 USApp Lexis 11041, 6 (10th Cir.) (6/22/89). The court finds the defendant has wholly failed to rebut the rebuttable presumption in favor of detention. The court fully agrees with and adopts the fact findings and legal conclusions of the Magistrate.

Finally, defendant urges that his continued indefinite detention violates the Due Process Clause as well as the Eighth Amendment. Defendant has been confined since June 19, 1989.

In *United States v. Salerno*, 95 LEd2d 697 (1987), the court declined to render an opinion as to when detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal. *Id.*, at 709 n. 4. However, the court there noted that the maximum length of pretrial detention is limited by the stringent limitations of the Speedy Trial Act. *See* 18 USC §3161 *et seq*. Defendant's detention has thus far not been excessively prolonged, and no Speedy Trial Act violation is claimed. Defendant has been found to be a danger to the community, which this court would have found even in the absence of the statutory presumption.

It is therefore

ORDERED

1. Plaintiff's motion granted. The plea bargain dated December 23, 1987 and filed November 8, 1988 is rescinded and defendant's guilty plea of November 8, 1988, is vacated.

2. Defendant's motion denied.

August 7, 1989.

/s/ Edward J. McManus
Edward J. McManus, Judge
UNITED STATES DISTRICT COURT

SEAL

U.S. Department of Justice
United States Attorney
Northern District of Iowa

319/399-2502

Post Office Box 4710
Cedar Rapids, Iowa 52407

December 23, 1987

Jerald Kinnamon
Mark C. Meyer
Attorneys at Law
537 Higley Building
Cedar Rapids, IA 52401

Re: U.S. v. Mike Britt (narcotics investigation)

Dear Sirs:

This letter will serve as a memorandum of a proposed plea agreement between the United States Attorney's Office for the Northern District of Iowa and your client, Mike Britt, relative to the disposition of an investigation now pending against him for drug related criminal activity.

The following is my understanding of the proposed plea agreement:

1. Mr. Britt will waive indictment and consent to proceed on the basis of an information which will charge him with one count of conspiracy to distribute and possess with the intent to distribute marijuana ending on about December 12, 1987, in violation of Title 21, United States Code, Section 841(a)(1) and Section 846. He will plead guilty to the Information and our office will file no other Title 21 criminal charges against him based upon

information now in our possession or information later provided by Mr. Britt under the conditions set forth below.

2. Mr. Britt agrees to fully and completely cooperate with the United States in its investigation into the use, possession, and trafficking of controlled substances and related criminal activity within the Northern District of Iowa and elsewhere.

Full and complete cooperation with the United States Attorney's Office and law enforcement agents includes but is not limited to the following:

A. providing intelligence information;

B. arranging for the purchases of narcotics by Mr. Britt and/or undercover agents;

C. providing the introduction of undercover agents to narcotics traffickers;

D. providing information to secure search warrants;

E. providing testimony before the federal grand jury and if necessary, testimony before the United States District Court as a witness in any prosecutions growing out of this investigation;

F. providing any documents in Mr. Britt's custody or possession or under his control that are relevant to this investigation;

G. making Mr. Britt available for interview and debriefing sessions by government attorneys and law enforcement agents upon request;

H. record narcotics related conversations as requested.

Any activities undertaken pursuant to subparagraphs (B) and (C) above must be such that there is no reasonable possibility that the activity will subject Mr. Britt to physical harm. This determination will be made in consultation with the investigating agents.

3. Mr. Britt will provide complete and truthful information to the attorneys and law enforcement officers of the government, and the federal grand jury conducting this investigation. He will answer all questions concerning this investigation and will not withhold any information. He will neither attempt to protect any person or entity through false information or omission, nor falsely implicate any person or entity. Since the United States insists upon Mr. Britt telling the truth and nothing but the truth during this investigation and in the event he should be called as a witness, his failure to provide truthful information will render this agreement void. Further, Mr. Britt will at all times tell the truth and nothing but the truth whether it be during investigation or as a witness at trial, regardless of who asks the questions – the prosecutors, defense attorneys, investigating agents, probation officers, or the judge.

4. No testimony or other information provided by Mr. Britt to the United States Attorney's Office or law enforcement officers or the federal grand jury conducting this investigation, pursuant to this agreement, or any information directly or indirectly derived from such testimony or other information, will be used against him in a

criminal trial, except in a prosecution for perjury or giving a false statement, provided that Mr. Britt does not violate the terms of this agreement pursuant to which the grant of immunity is being made. However, such testimony or other information may be used to impeach his credibility in any trial and may be considered by the court of probation office at any time. The United States Attorney's Office will advise the Court and the Probation Office as to which portion of such information was provided solely by Mr. Britt.

5. It is understood that, upon request by the government, Mr. Britt will voluntarily submit to a polygraph examination. In the event he is called upon by the government to submit to a polygraph examination and his performance in the examination, given the totality of the circumstances of the examination, and given the reliability of the polygraph itself, suggests a conscious intent to deceive, mislead or lie, he will be afforded an opportunity to review and explain and deceptive responses to the government. If the totality of circumstances convinces the government that his statement is not complete and truthful, he will be so informed and any and all obligations imposed on the government by this agreement will be rendered null and void. This decision will be in the sole discretion of the United States Attorney, for the Northern District of Iowa, but such discretion must be based on an informed and reasonable interpretation of the information available to the United States Attorney.

6. Mr. Britt agrees to forfeit, give up, and give away to the United States prior to the date of sentencing herein,

and right, title and interest which he may have in the following items:

(a) all controlled substances which have been possessed in violation of federal law, all raw materials, products, and equipment of any kind which are or have been used, intended for use in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of federal law.

(b) all property which is or has been used or intended for use as a container for the items referred to subparagraph (a).

(c) all conveyances, including aircraft, vehicles, or vessels which are used or have been used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of items referred to in subparagraph (a).

(d) all monies, negotiable instruments, securities, or other things of value, furnished or intended to be furnished by any person in exchange for a controlled substance in violation of federal drug laws, and all proceeds traceable to such an exchange, and all monies, negotiable instruments, and securities used or intended to be used to facilitate any violation of the federal drug law.

(e) all real property, including any right, title, and interest in the whole of any lot or tract of land and any appertinances or improvements which is used, has been used, or intended to be used in any manner or part, to commit, or to facilitate the commission of, or violation of a federal drug law which is a felony. However, Mr.

Britt's homestead at 15 Riley Drive, Ottumwa, Iowa, is specifically excluded from forfeiture under this provision of the agreement provided the terms of the agreement are fulfilled.

It is understood that no property shall be forfeited under this paragraph of the plea agreement to the extent of the interest of an owner, by reason of any act or ommission [sic] established by that owner to have been committed or ommitted [sic] without the knowledge or consent of that owner.

7. Specifically, the forfeiture provision of this plea agreement requires, but is not limited to the forfeiture of the following specified items:

> 1983 Ford 4-dr Crown Victoria, State of Iowa license SJJ-864, VIN #ZFABP43F80114320
>
> 1985 Silver 4-dr Crown Victoria, State of Iowa license BAMBI L.
>
> An undetermined amount of NAVESTAR Trucking stock which was purchased with drug money proceeds.
>
> Beechcraft satellite dish, approximately 2 years old.
>
> $89,250 seized from Mr. Britt at the time of his arrest to which he also agrees to abandon to the United States forthwith.

8. Within two weeks of Mr. Britt signing this agreement, he agrees to provide the United States Attorney's Office for the Northern District of Iowa with written documentation of his ownership or right, title, or interest, in the aforementioned items. In the event he is unable to provide documentation of his right, title, and interest in

such items within two weeks of his signing this agreement, he shall relinquish custody of those items to the United States at that time.

9. Mr. Britt hereby agrees not to waste, sell, dispose of, or otherwise diminish the value of any items or property referred to in paragraphs 6-9 above prior to forfeiting them to the custody of the United States. He further agrees to not contest any forfeiture action or proceeding brought on behalf of any government agency involved in this investigation which seeks to forfeit property described in paragraphs 6-9 of this agreement.

10. Mr. Britt shall not reveal or discuss the existence or conditions of this agreement and his cooperation to any person other than his attorneys and law enforcement personnel involved in this investigation. Nor shall be disclose to any person, directly or indirectly, without prior authorization, other than his attorney, the true identity or occupation of any law enforcement personnel participating in this investigation in an undercover capacity or otherwise. Nor shall he disclose to any person without prior approval the location or investigative offices, surveillance locations, or the nature of investigative techniques used by agents in this investigation.

12. If he violates the terms of this agreement, any such testimony or other information provided by him at any time to attorneys or law enforcement officers of the government, or the federal and grand jury, may and will be used against him. No statements or other information provided by him shall be deemed to be precluded from use against him in the case of his breach of this agreement.

13. The United States makes no representations or promises as to the sentence to be imposed as this is solely within the District Court Judge's discretion. The District Court Judge's discretion may in the appropriate case by limited and guided by the United States Sentencing Commission guidelines which apply to offenses committed, or continuing, on or after November 1, 1987. The United States will advise the Court of his degree of recognition and affirmative acceptance of personal responsibility for his involvement in the offense to which he has agreed to plead guilty and will ask the Court to consider his acceptance of responsibility in imposing it's sentence upon him.

Moreover, at or before the time of sentencing, the United States will advise the Court of any good faith effort made by Mr. Britt to provide "substantial assistance" in the ongoing investigation into the use, possession, and trafficking of controlled substances and related criminal activity within the Northern District of Iowa and elsewhere. The United States will also advise the Court of any good faith effort made by Mr. Britt to provide substantial assistance in the prosecution of another person who has committed a criminal offense. If the Court finds that his assistance was indeed "substantial", then it may consider that assistance in deciding whether to depart from the sentencing guidelines. So that the Court may better assess whether any assistance provided by Mr. Britt should be deemed "substantial", the United States agrees to advise the Court of the following considerations:

(A) The government's evaluation of the significance and usefulness of any assistance rendered by Mr. Britt.

(B) The truthfulness, completeness, and reliability of any information or testimony provided by Mr. Britt.

(C) The nature and extent of his assistance.

(D) Any injuries suffered or any danger or risk of injury to Mr. Britt or his family resulting from any assistance provided by Mr. Britt.

(E) The timeliness of any assistance provided by Mr. Britt.

14. Finally, the United States will not make any recommendation as to the length of sentence to be imposed, but is free to comment as to factual matters related to the case and sentencing, including the right to contest factual misstatements made by Mr. Britt at the time of plea or sentencing.

15. Mr. Britt agrees to pay to the United States a special assessment of $50, as required by 18 U.S.C. 3013(b), prior to but not later than the sentencing date in this case.

16. If this agreement is acceptable, please indicate your acceptance by signing below where indicated.

Dated this 23rd of December, 1987.

Sincerely,

CHARLES W. LARSON
UNITED STATES ATTORNEY

By, /s/ Richard L. Murphy
Richard L. Murphy
ASSISTANT UNITED STATES ATTORNEY

The undersigned accept the terms of the above plea agreement.

/s/ Mike Britt
MIKE BRITT,
Defendant

/s/ Richard L Murphy
RICHARD L. MURPHY
Assistant United
States Attorney

/s/ Jerald Kinnamon
JERALD KINNAMON,
Attorney for Mike Britt

/s/ Mark Meyer
MARK MEYER,
Attorney for Mike Britt

IN THE UNITED STATES FEDERAL COURT
CEDAR RAPIDS, IOWA DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CR 88-75
vs.	)	
MICHAEL BRITT,	)	HEARING OF PLEA
Defendant.	)	

APPEARANCES

ASSISTANT UNITED STATES ATTORNEY RICHARD L. MURPHY, U.S. Courthouse, Cedar Rapids, Iowa 52401, appeared on behalf of the United States.

ATTORNEY MARK C. MEYER and ATTORNEY JERALD W. KINNAMON, 330 First Street, S.E., Cedar Raids, Iowa 52401, appeared on behalf of the Defendant Michael Britt.

The above-entitled matter came on for hearing before the Honorable Judge Edward J. McManus at 10:20 a.m., November 8, 1988, at the Federal Courthouse, Cedar Rapids, Iowa.

[p. 2] PROCEEDINGS

THE CLERK: The next matter to be brought before the Court is the plea in criminal No. 8875, United States versus Michael Britt. Who appears for the Government?

MR. MURPHY: Richard –

THE COURT: He's going to appear for everybody. Just go ahead directly to the Defendant.

THE CLERK: Who appears for the Defendant?

MR. KINNAMON: Jerald Kinnamon and Mark Meyer.

THE CLERK: Are you ready to proceed?

MR. KINNAMON: We are.

THE CLERK: Will the Defendant please rise? I have before me a copy of an Information which has been filed against you in this action. Have you received a copy of this Information?

THE DEFENDANT: Yes, I have.

THE CLERK: Is your name Michael Britt as charged in the Information?

THE DEFENDANT: Yes, it is.

THE CLERK: How old are you?

[p. 3] THE DEFENDANT: 28.

THE CLERK: Are you presently incarcerated upon any state charges?

THE DEFENDANT: No.

THE CLERK: Have you had an opportunity to visit with your attorneys concerning the nature of these charges and proceedings?

THE DEFENDANT: Yes, I have.

THE CLERK: Do you feel that you understand the nature of the charges contained in the Information?

THE DEFENDANT: Yes, I do.

THE CLERK: Do you desire to have the Information read at this time?

THE DEFENDANT: No.

THE CLERK: You're advised that you have the right to have this matter presented to a grand jury, a body of persons consisting of not more than 23 and not less than 16, for consideration of the charges against you. The grand jury upon considering the matter may return a true bill charging you with the offense herein set out or they may return a no true bill which will result in failure of this [sic] charges. [p. 4] You may, however, waive this right and concent [sic] to proceed upon the United States Attorney's Information which shall be referred to throughout these proceedings. Do you desire to waive indictment?

THE DEFENDANT: Yes, I do.

THE CLERK: Do you have a waiver?

MR. KINNAMON: Waiver has been executed.

THE CLERK: Have you visited with your attorney concerning this waiver?

THE DEFENDANT: Yes, I have.

THE CLERK: Is your waiver based upon their advice and with their consent?

THE DEFENDANT: Yes.

THE CLERK: Have you been satisfied with your attorneys' representation?

THE DEFENDANT: Yes.

THE CLERK: Mr. Kinnamon, have you advised the Defendant concerning this matter?

MR. KINNAMON: Yes, I have.

THE CLERK: Is his waiver based upon your advice?

MR. KINNAMON: It is.

THE CLERK: Do you know of any reason [p. 5] why the Court should not accept this waiver?

MR. KINNAMON: I do not.

THE CLERK: For the record, a Waiver of Indictment has been filed in this matter on November 8, 1988. Are you prepared to enter a plea?

THE DEFENDANT: Yes, I am.

THE CLERK: And how do you plead to Count I of the Information?

THE DEFENDANT: Guilty.

THE COURT: Mr. Britt, you also understand that before I can accept your plea of guilty that you're going to be placed under oath and then on the record, and in the presence of your lawyers, I'm going to ask you certain questions about the offense and your understanding of what's going on here this morning. Any answers you gave me may later be used against you in a prosecution for perjury if you don't tell the truth.

THE DEFENDANT: Yes, sir.

THE COURT: Put the Defendant under oath.

MICHAEL BRITT,

called as a witness, being first duly sworn, was [p. 6] examined and testified as follows:

THE COURT: You're charged in the Information with conspiracy to distribute marijuana. The crime has three elements to it: The first element is that the conspiracy described in the Information was willfully formed and existed at or during the time period alleged; number two, that you willingly became a member of the conspiracy; and third, that you knew that the object of the conspiracy was to distribute marijuana. Do you understand these elements?

THE WITNESS: Yes, I do.

THE COURT: Do you understand that the maximum punishment that you can get for this offense is imprisonment for not more than five years or a fine of a quarter of a million dollars or both, plus a $50 special assessment, and in addition, not more than a three-year term of supervised release. Also, restitution can be ordered to any victims of this offense if it is applicable to your case. This occurred after the effective date of the Reform Act of 1984 which involves sentencing guidelines. Are you aware that the sentence that you receive in this [p. 7] case will be imposed pursuant to this sentencing reform act and under the sentencing guidelines?

THE DEFENDANT: Yes, I am.

THE COURT: Have you discussed this matter with your lawyers?

THE DEFENDANT: Yes, I have.

THE COURT: Nonetheless, are you also aware that the maximum sentence which can be imposed in this case cannot exceed the maximum that I've already told you about?

THE DEFENDANT: Yes, Your Honor, I do.

THE COURT: All right. I would advise you, Mr. Britt, that you have the right – the constitutional rights to plead not guilty to this charge, to be tried by a jury with the assistance of a lawyer, the right to confront and cross examine witnesses that might be brought against you, and to present your own witnesses. You have the right to remain silent, not to incriminate yourself, and the right to make the Government prove this charge against you beyond a reasonable doubt. But if you plead guilty and I accept your plea, there won't be a further trial of any kind. Do you understand?

[p. 8] THE DEFENDANT: I understand, Your Honor.

THE COURT: Are you entering your plea voluntarily of your own free will because you are guilty and for no other reason?

THE DEFENDANT: Yes, I am.

THE COURT: Is your plea the result of force or threats or promises by anybody other than a plea bargain?

THE DEFENDANT: No, sir, it's not.

THE COURT: Is there a plea bargain?

MR. MURPHY: Yes, there is, Your Honor. The plea bargain is in the letter dated December 23, 1987, signed on January 6, 1988, by myself, Mr. Britt, Mr. Kinnamon, and Mr. Meyer; and I provide the Court with a copy and ask it be filed under seal as Government's Exhibit 1.

THE COURT: We'll have this marked Exhibit 1. This is dated December 23rd, '87, as indicated by Mr. Murphy and signed on January 6th of '88. Your – Mike Britt's name appears on page 7. That's your signature, Mr. Britt?

THE DEFENDANT: Yes, it is, Your Honor.

THE COURT: This was read over to [p. 9] you?

THE DEFENDANT: I read it.

THE COURT: You read it yourself? You believe you understand the contents of it?

THE DEFENDANT: I understand it, Your Honor.

THE COURT: Did you go over it with your lawyers?

THE DEFENDANT: Yes, I have.

THE COURT: Do I understand, Mr. Murphy, that this does not restrict the Court in its sentencing?

MR. MURPHY: That's correct, Your Honor.

THE COURT: Was there any other condition or provision that you thought was part of the bargain that isn't contained in this letter of December 23rd?

THE DEFENDANT: No, Your Honor.

THE COURT: That covers the entire bargain?

THE DEFENDANT: I think so, Your Honor.

THE COURT: Mr. Meyer, was there anything else that – any other condition or [p. 10] provision you thought was part of the deal that that [sic] isn't in this letter?

MR. MEYER: No, Your Honor.

THE COURT: All right, I'll accept the plea bargain.

THE COURT: Now, earlier I told you, Mr. Britt, about the elements of this offense. Did you in fact do or commit each of these elements with the intent that I've indicated as an element?

THE DEFENDANT: Yes, I did, Your Honor.

THE COURT: Tell me what you did.

THE DEFENDANT: I met with Mr. Newland in '86, I believe. I believe it was October of '86. I purchased 50 pounds of marijuana from him at the Comfort Inn in Ottumwa, Iowa. I didn't hear from Mr. Newland for – well, until, I suppose, the following year. And he indicated to me that he had some marijuana for sale, and he indicated to me that I could purchase some. He wanted me to buy some. And through probably a half a dozen phone calls of him calling me, that we arranged a meeting at the Red Roof Inn in Cedar Rapids, Iowa, and I attempted to [p. 11] purchase $89,000 worth of marijuana. I was than arrested.

THE COURT: Who is this you purchased it from or attempted to purchase it from?

THE DEFENDANT: Joseph Newland.

THE COURT: Who is he?

THE DEFENDANT: He's – he's a gentleman that lives in Phoenix, Arizona. He's formerly from Cedar Rapids and the Marion area.

THE COURT: How much was it you were to pay for it, 80 what thousand?

THE DEFENDANT: 89,000, Your Honor?

THE COURT: 89,000. Did you pay him the money?

THE DEFENDANT: I didn't pay him the money. The transaction was interrupted by the DCI and the FBI and the DEA.

THE COURT: Did you have an agreement with him to buy this marijuana from him and then sell it?

THE DEFENDANT: Yes, I did.

THE COURT: All right. Mr. Murphy, your factual basis?

MR. MURPHY: Yes, Your Honor. The evidence would show as Mr. Britt has indicated [p. 12] that he had a prior dealing with Mr. Newland of 50 pounds, that as he's indicated, in December of '87 he attempted to purchase 150 pounds from Mr. Newland at the Red Roof Inn in Cedar Rapids, that it was what we call a reverse buy situation where we were offering to sell marijuana, and we seized the $89,000 in cash from Mr. Britt. He had driven up to the Northern District of Iowa from Ottumwa – I believe the Ottumwa, Iowa, area with a person by the name of Dan Stevens. They brought two vehicles they were going to use to transport marijuana back to the Southern District of Iowa for distribution. If the matter were to go to trial at this point we would have witnesses including Joe Newland, Dan Stevens, the law enforcement officers who doing [sic] the surveillance, Doug Bell, Kim Gidrey, Steve Demeulenaere, D-e-m-e-u-l-e-n-a-e-r-e, and potentially a David Rose, who are individuals who

would testify about prior or other dealings that they had with the Defendant involving marijuana between the period alleged in the Information.

Mr. Britt, do you agree that – agree that you had an agreement with at least one of [p. 13] those individuals, including Joe Newland, to distribute or to possess with the intent to distribute marijuana during the time alleged?

THE DEFENDANT: Yes, I do, Mr. Murphy, but I don't know this Steve Demeulenaere.

MR. MURPHY: Steve Demeulenaere?

THE DEFENDANT: Oh, oh, yeah, okay, I understand now.

MR. MURPHY: Okay. And you do agree that you had this agreement with people other than Mr. Newland?

THE DEFENDANT: Yes, I do.

MR. MURPHY: I have no further questions, Your Honor.

THE DEFENDANT: Your Honor, I didn't have enough money to buy 150 pounds.

THE COURT: But you did have the 80 some thousand?

THE DEFENDANT: Yes, I did.

THE COURT: All right. In light of these things we talked about here, do you still want to plead guilty?

THE DEFENDANT: Yes, I do.

THE COURT: Mr. Meyer, do you know of any reason why I shouldn't accept the plea?

[p. 14] MR. MEYER: No, Your Honor.

THE COURT: All right, I'll accept the Defendant's plea of guilty to Count I in the Information. Since this is a guidelines case, sentencing won't occur for at least two months. You'll be notified as to the date and time to appear in court for sentencing. There will have to be a presentence report prepared, and I would suggest that you and your lawyers get together with the probation office today before leaving court to commence the preparation of that report. Is the bail heretofore fixed agreeable, Mr. Murphy?

MR. MURPHY: Yes, it is, Your Honor.

THE COURT: All right, the bail that was heretofore fixed will be continued pending sentencing.

MR. MURPHY: Thank you, Your Honor.

THE COURT: That will be all, gentlemen.

(The proceedings concluded at 10:40 a.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL BRITT, Defendant.	NO. CR 88-75 MOTION TO VACATE PLEA AGREEMENT HEARING

The above-entitled matter came on for hearing before the Honorable Edward J. McManus, Senior Judge, at the Third Floor United States Courthouse, Cedar Rapids, Iowa, on June 8 and 19, 1989, taken before Kimberly K. Kurth, Certified Shorthand Reporter of the State of Iowa.

APPEARANCES:

MR. RICHARD MURPHY, Assistant United States Attorney, 425 Second Street, S.E., Suite 950, The Center, Cedar Rapids, Iowa, 52404; appeared on behalf of the Plaintiff.

MR. JERALD W. KINNAMON and MR. MARK C. MEYER of Kinnamon, Kinnamon, Russo & Meyer, Attorneys at Law, 537 Higley Building, Cedar Rapids, Iowa, 52401; appeared on behalf of the Defendant.

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* * *

[p. 62] EXAMINATION

BY MR. MURPHY:

Q. Agent Dudley, much of the time spent with Mr. Britt was spent trying to coax the truth out of him; isn't that true?

A. That's true. We did spend a lot of time going over things.

Q. And particularly pretrial isn't it true that Mr. Britt feigned some memory lapses and needed to be –

MR. KINNAMON: Your Honor, I'm going to object to the form of that question. It calls for an opinion, conclusion on the part of the witness for which there's no foundation laid.

MR. MURPHY: I'll rephrase it, Your Honor.

[p. 63] Q. Tell me about the pretrial interviews with Mr. Britt before the Stevens trial. How cooperative was he?

A. He was not very cooperative. He claimed that some of the statements which he had made to us initially upon his arrest concerning the events surrounding that day with Stevens, he claimed that he couldn't remember now whether that was really the case, and in fact he had a little bit different memory with regard to some of the facts. And, you know, going through this thing where he wouldn't deny that he had lied to us initially, but he said he couldn't remember for sure now. And if he said it, then it was true, but he wasn't sure now, that sort of thing.

* * *

[Testimony of Dan Stevens]

[p. 97] Q. Now, subsequent to the trial, you were ordered detained without bond; is that correct?

A. That's correct.

Q. And you, after giving it some more consideration, wanted to cooperate with the Government; is that correct?

A. That's correct.

Q. What did you do in that regard by way of cooperation?

[p. 98] A. Signed a plea agreement.

Q. And did you do anything actively by way of cooperation with the Government?

A. Yes, I did.

Q. What did you do?

A. Made recorded phone calls and recordings.

Q. Did you make any recordings with the Defendant?

A. Yes, I did.

Q. Where did you do that?

A. At his residence, and I believe we went to a Target store somewhere.

Q. On January 12th, 1989 do you recall making the recording with the Defendant?

A. Yes. I remember the recording. I don't remember the date, but I remember the recording.

* * *

UNITED STATES DISTRICT COURT
NORTHERN District of IOWA

UNITED STATES OF AMERICA

V.

MICHAEL BRITT

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT
(Filed Oct. 20, 1989)

Case Number CR 88-75

Mark Meyer
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count 1 of the second Information.

[X] was found guilty on count 1 of the second Information after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 USC §846	Conspiracy to distribute & possess with the intent to distribute more than 50 kilograms of marijuana, a Schedule I controlled substance	1

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) NA, and is discharged as to such count(s).

[ ] Count(s) ___ (is) (are) dismissed on the motion of the United States.

[ ] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[X] It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due within 24 hours.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

479-78-4491

Defendant's mailing address:

15 Riley Dr.
Ottumwa, Iowa 52501

Defendant's residence address:

15 Riley Dr.
Ottumwa, Iowa 52501

October 16, 1989
Date of Imposition of Sentence

/s/ David R. Hansen
Signature of Judicial Officer

David R. Hansen, U.S. District Judge
Name & Title of Judicial Officer

October 19, 1989
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 184 months.

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district,

[ ] at ___ a.m./p.m. on ___.

[ ] as notified by the Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on ___.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on ___ to ___ at ___, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

1. The defendant is prohibited from possessing a firearm or other dangerous weapon as defined in the federal code, the state code of any state where the defendant is residing or the sentencing guidelines.

2. The defendant is prohibited from incurring any new credit charges or opening additional lines of credit without the approval of his probation officer.

3. The defendant shall provide the probation officer access to any requested financial information.

4. The defendant shall participate in a program approved by the U.S. Probation Office for substance abuse, which program may include random testing of bodily fluids to determine whether or not the defendant has reverted to the use of drugs or alcohol.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

RESTITUTION, FORFEITURE, OR
OTHER PROVISIONS OF THE JUDGMENT

APPROVAL AS TO FORM

The undersigned has reviewed the foregoing judgment and it is approved as to form.

/s/ Richard L. Murphy
Assistant United States Attorney

United States District Court Clerk's Record

CR 88-75 USA vs. MICHAEL BRITT

1988

9-27	1.	CRIMINAL COMPLAINT
9-27	2.	ORDER Sealing Complaint & Affidavit
9-27	3.	PRAECIPE for summons to Marshal for service-Initial appearance set for Oct. 6, 1988 at 1:00 p.m. w/Magistrate
10-6	4.	ORDER Setting Conditions of Release: $5,000 Non-surety (CMA)
10-6	5.	APPEARANCE BOND of $5,000 Non-surety (CMA)
10-6	6.	SUMMONS w/Marshal's Return
10-6	7.	CLERK'S Court Minutes of Initial Appearance
10-20	8.	INFORMATION
10-24	9.	PRAECIPE for Summons to Marshal for service-Arraignment set for November 10, 1988 at 11:00 A.M. w/Magistrate Jarvey (Mailed certified copy of summons to Atty. Meyer)
11-2	10.	SUMMONS w/Marshal's Return
11-8	11.	WAIVER of Indictment
11-8	12.	CLERK'S Court Minutes on Plea
11-8	13.	GOVT'S. Exhibit No. 1 – Plea Bargain – SEALED

1989

1-4	14.	MOTION for Extension of Time (Pltf.)
1-26	15.	ORDER: Upon application pltf. shall have til February 15, 1989 to object to pre-sentence investigation report (CMA)

2/14	16.	NOTICE of Sentencing; April 7, 1989 8:00 a.m. 3rd flr courtroom (CMA)
2-16	17.	MOTION to Continue Sentencing (Deft.)
2-16	18.	GOVT'S. Motion to Vacate Plea Agreement & Guilty Plea (Pltf.)
2-21	19.	NOTICE Of RESETTING Sentencing to May 8, 1989 at 1:00 P.M. W/Judge Hansen (CMA)
2-28	20.	RESISTANCE to Motion for Hearing & to set aside plea (Deft.)
2-28	21.	MEMORANDUM in Resistance to Motion for Hearing & to set aside plea (Deft.)
3-1	22.	EXHIBIT (Deft.)
03-16	23.	ORDER: Mot. to vacate plea will come for HEARING at 1:00 p.m. Monday, May 8, 1989, 3rd flr courtroom; Sentencing deferred pending resolution of govt's mot. to vacate plea agreement & guilty plea (CMA)
4-26	24.	MOTION to Continue (Deft.)
4-28	25.	ORDER: Deft's. motion to continue filed April 26, 1989 granted; Govt's. motion to vacate plea agreement & guilty plea set for hearing May 17, 1989 at 9:00 A.M. w/Judge hansen [sic] (CMA)
5-11	26.	NOTICE of RESETTING Motion to vacate plea agreements hearing to May 23, 1989 at 9:00 A.M., 2nd Floor Courtroom w/Judge McManus (CMA)
5-17	27.	AMENDMENT to Resistance to Motion for Hearing & to Set Aside Plea (Deft.)
5-17	28.	MEMORANDUM In Support of Amended Resistance to Motion for Hearing & to Set Aside Plea (Deft.)
5-17	29.	AFFIDAVIT in Resistance to Motion to Vacate Plea (Deft.)

5-18	30.	MOTION for Continuance (Pltf.)
5-19	31.	ADDENDUM to Motion for Continuance (Pltf.)
5-19	32.	ORDER: Pltfs. unresisted motion for continuance filed May 18, 1989 granted; motion to vacate plea agreement hearing RESET to June 8, 1989 at 9:00 A.M., 3rd Floor Courtroom w/Judge McManus (CMA)
6-8	33.	CLERK'S Court Minutes on Motion to Vacate Plea Agreement Hearing; deft. detained; Hearing on detention set for June 12, 1989 at 9:00 A.M. or sooner if magistrate available
6-8	34.	PLTF'S. WITNESS & EXHIBIT LIST
6-8	35.	DEFT'S. EXHIBIT LIST
6-9	36.	NOTICE of RESETTING Bond revocation Hearing to June 13, 1989 at 9:00 A.M. w/Magistrate (CMA)
6-13	37.	CLERK'S Court Minutes on Detention Hearing; deft. detained
6-13	38.	EXHIBIT LIST
6-19	39.	ORDER: Deft. detained pending sentencing; deft. committed to custody of Atty. General for confinement (CMA)
6-19	40.	CLERK'S Court Minutes on Motion to Vacate Plea Agreement Hearing; briefing schedule: pltf. 6-26-89, deft. 7-3-89, pltf. reply 7-7-89
6-19	41.	WITNESS & EXHIBIT LIST
6-26	A.	PROPOSED Findings of Fact & Conclusions of Law (Pltf.)
6-28	42.	MOTION to Amend or Revoke Pre-Trial Detention Order (Deft.)
6-28	43.	BRIEF in Support of Motion to AMend [sic] or Revoke Pre-Trial Detention Order (Deft.)

7-3	B.	DEFT'S. PROPOSED Findings of Fact & Conclusions of Law (Deft.)
7-3	C.	BRIEF Supporting Deft's. Proposed Findings of Fact & Conclusions of Law
7-25	44.	MEMORANDUM in Support of Resistance to Motion to Amend or Revoke Pre-Trial Detention Order (Pltf.)
07/31	D.	RESPONSE to deft's proposed findings of fact and conclusions of law
8-7	45.	ORDER: Pltf's. motion to vacate plea agreement & plea granted; Deft's. motion to amend or revoke detention order denied (CMA)
8-23	46.	SECOND INFORMATION
8-23	47.	WAIVER of Indictment
8-23	48.	CLERK'S Court Minutes on Take of Plea
8-28	49.	ORDER Accepting Deft's. Plea of Guilty; Sentencing set for October 16, 1989 at 1:00 P.M. w/Judge Hansen (CMA)
9-12	50.	ORDER: Deft. released to custody of FBI for transporting to IA Div of Criminal Investigation Office in C.R. on Sept. 12, 1989 for further proceedings in compliance w/plea agreement; Upon completion of meeting FBI to return deft to Linn County Jail (CMA)
9-14	51.	MOTION to Reconsider ruling denying deft's. motion to amend current order requiring deft's. attention w/out bond (Deft.)
9-14	52.	BRIEF in Support of motion to reconsider ruling denying deft's. motion to amend current order requiring deft's. attention w/out bond (Deft.)
9-29	53.	RESISTANCE to Deft's. Motion (Pltf.)

10-16 54. CLERK'S Court Minutes on Sentencing

10-20 55. JUDGMENT Including Sentence Under the Sentencing Reform Act (CMA)

10-25 56. NOTICE OF APPEAL: Copies mailed to Appeals Court; US Atty. & Atty. Meyer w/docket sheets; US Marshal; US Probation; Court Reporter

10-25 57. ORDER: Deft's. motion to reconsider ruling denying deft's. motion to amend the court's order detaining deft. w/out bond filed Sept. 14, 1989 denied (CMA)

AMENDMENT 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 32(d), Federal Rules of Criminal Procedure, provides:

> "If a motion for withdrawal of a guilty plea is made before sentence is imposed . . . the Court may permit withdrawal of the plea upon a showing *by the Defendant* of any fair and just reason. At any later time a plea may be set aside only on direct appeal or by motion under 28 USC 2255." (emphasis added)

Rule 11(e)(3) provides, in relevant part, that:

> "If the trial court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement."